IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1069

ASSOCIATED ENTERPRISES, INC. and JOHNSTON FUEL LINES,

Appellants,

v.

TOLTEC WATERSHED IMPROVEMENT DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

No. 71-1456

SALYER LAND COMPANY, *et al.*,

Appellants,

v.

TULARE LAKE BASIN WATER STORAGE DISTRICT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION SOUTH TEXAS PROJECT, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE*

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The American Civil Liberties Union and South Texas Project of the ACLU Foundation have requested the parties in these cases to consent to filing the attached brief *amicus curiae* out of time. The Appellants in No. 71-1069 and the Appellee in No. 71-1456 have granted their consent; the Appellee in No. 71-1069 has denied consent.*

The American Civil Liberties Union is a nation-wide, nonpartisan organization of over 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights and the 13th, 14th and 15th Amendments to the United States Constitution. The South Texas Project of the ACLU Foundation is a recently created, separate affiliate of the ACLU. The primary purpose of the Project is to secure through litigation the rights of poor Chicanos who dwell in the lower Rio Grande Valley of Texas. Specifically, the project is designed to secure their rights to participate in the governance of the various state created and recognized Water Districts in the lower Rio Grande Valley, to enjoy an adequate supply of potable water, and otherwise to enjoy equally the civil rights and liberties guaranteed to all citizens and residents of the United States.

The lower Rio Grande Valley of Texas is the area at the Southern tip of Texas. Approximately 180,000 people reside in Hidalgo County, 140,000 people in Cameron County, 15-20,000 in Willacy County, and 15,000 in Starr County. About 80% of the approximately 350,000 odd persons in the Valley are Chicanos. Many of these people are migrant laborers who make the Valley their home when they are not migrating to pick crops. Approximately a

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* These letters have been filed with the Clerk of the Court. Through inadvertence, consent from counsel for the Appellants in No. 71-1456 was not sought until earlier this week. When the response to that request has been received, it will be filed with the Clerk.

third of the Chicano population—perhaps as many as 100,000 people—live in groupings of small homesteads called *colonias*. The residents of the *colonias* are almost uniformly denied access to potable water and are denied the right to participate in elections of the some thirty-five Water Districts in the Valley.

The *colonias* consist of small lots subdivided from a common parcel and "sold" under land sale contracts. Typically the buyer advances a very small sum—perhaps five dollars—as a down payment, and is then obligated to pay a similar amount each month. Under this installment arrangement, the interest on the indebtedness alone often exceeds the payments on principal and in practical effect the buyer is more of a lifetime tenant than an owner. The lots within the *colonias* come equipped with virtually none of the amenities normally associated with developed land. There are rough roads, but no provision for water. Although often adjacent to cities, the *colonias* are unincorporated. Cf. *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

The incorporated population centers and many of the larger farms in the four rural counties which comprise the Lower Rio Grande Valley are serviced by "Water Control Improvement Districts" and "Water Improvement Districts"; these are special purpose districts, created under authority of state statute which have the full range of powers normally associated with such districts, including the right to tax and to exercise the power of eminent domain. Through these districts, the residents of the incorporated areas have access to safe drinking water at reasonable prices. The water which is distributed by these districts is drawn from the Rio Grande and then purified in facilities owned and operated by the districts.

The majority of the *colonias* are not serviced by water districts. There are various means by which service is denied, but typically one of two factual patterns prevails. Often, a *colonias* is within the geographic borders of an extant water district, but the district has decided not to service the *colonias*. This common practice is made possible by the state statutes governing the elections of water district officers which either prohibit anyone but the owners and operators of farms from voting, or discourage others from voting, for example, by providing inadequate notice of elections. Accordingly, the residents of the *colonias* in no way comprise the constituency of the elected district officers. A second common pattern involves the delineation of water district lines in such a way that all agricultural land under production is included and adjacent or surrounded *colonias* are excluded. Under Art. 8280-3.2, Vernon's Ann. Tex. Civ. Stats. (1971), the Board of Directors of any Water Control and Improvement District may exclude any urban property (construed to include the *colonias*) by resolution. Various Water Districts have excluded *colonias* wholesale.

On December 15, 1972, the ACLU and the South Texas Project of the ACLU Foundation filed in the United States District Court for the Southern District of Texas, a civil rights class action for injunctive and declaratory relief challenging the exclusion of numerous *colonias* from the Hidalgo County Water Improvement District No. 2 (by resolution dated October 28, 1971) and the Hidalgo and Cameron Counties Water Control and Improvement District No. 9 (by resolutions and orders dated September 6 and October 17, 1972). *Jimenez, et al.* v. *Hidalgo County Water Improvement District No. 2, et al.*, and *Hidalgo* and *Cameron Counties* Water Control and Improvement District No. 9, Civ. Action No. 72-B-171 (U.S. D. Ct. S.D.

Tex.). Allegations are made in the complaint to support several causes of action under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983. *Colonias* have been unequally excluded from voting of Water Districts. See, e.g., *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969); *Harper* v. *Virginia State Board of Education*, 383 U.S. 663 (1966); see also, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); cf. *Evans* v. *Cornman*, 398 U.S. 419 (1970). Notice of elections and of resolutions to exclude the *colonias* from Water Districts have not conformed with the elementary requirements of due process of law. See, e.g., *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Robinson* v. *Hanrahan*, 34 L. Ed.2d 47 (1972).

Because the issues before this Court in the instant cases are closely related to the issue being litigated on behalf of the impoverished Chicanos dwelling on the *colonias* in the Lower Rio Grande Valley, the *amicus curiae* respectfully prays leave to file this brief out of time.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE SOUTH TEXAS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION *AMICUS CURIAE*

Interest of *Amicus*

The interest of the *amicus* appears from the preceding motion.

Statement of the Case

This brief is submitted in two cases raising similar issues.

The first case, *Associated Enterprises, Inc., and Johnston Fuel Lines* v. *Toltec Watershed Improvement District*, No. 71-1069, comes from Wyoming. The Toltec Watershed District was organized under the provisions of Wyoming Statutes 1957 sections 41-354.1 through 41-354.26, which provide that only landowners may vote for the creation of a water district, and that before the district can be created it must be approved by voters who own a majority of acreage contained in the district of creation. Because Johnston Fuel Lines, a Wyoming corporation, does not own land but leases land from Associated Enterprises, Inc., Johnston was unable to vote in the referendum pursuant to which the Watershed Improvement District was created. After it was created, Toltec instituted an action against Associated for a right of entry upon lands owned by Associated and leased to Johnston. The entry was sought to conduct a feasibility study concerning the building of a reservoir on lands owned by Associated and leased to Johnston. Johnston intervened in the action and with Associated defended on the ground that the Toltec Watershed Improvement District was organized under a Wyoming statute which violated the Equal Protection Clause of the Wyoming and United States Constitution. The District Court in and for Albany County, Wyoming upheld the Wyoming Watershed Improvement Act, and on appeal the constitutionality of the Act was again affirmed, 490 P.2d 1069.

The second case is a direct appeal from a three-judge United States District Court in California. *Salyer Land Co., et al.* v. *Tulare Lake Basin Water Storage District,* No. 71-1456. The Tulare Lake Basin Water Storage District was organized under California Water Code Sections 39000-48401. Section 41000 provides, in effect, that only holders of title to land may vote in district elections. Section 41001 provides that each voter may cast one vote for every $100, or fraction thereof, of assessed valuation. Upon creation in 1926, the Tulare Lake Basin Water Storage District was divided into eleven divisions, or election districts, from each of which one member of the governing board is elected. There have been no changes in division boundaries since then.

One of the appellants is a large landowner and lessee of land within the district, one is a small landowner, one is a resident who owns no land, two are small landowners and members of the Board of Directors of the District. They sued under the Fourteenth Amendment and 42 U.S.C. Section 1983 to challenge limitation of voting to landowners within the District, the weighted voting, and malapportionment of voting divisions within the District.

The majority of the three-judge court ruled that limiting the vote to real property owners and weighting their votes according to assessed valuation does not violate the Equal Protection Clause, but that the election divisions within the Water Storage District were unconstitutionally malapportioned because no adjustment had been made in them for 40 years, despite great changes in assessed valuation among the divisions. Judge Browning dissented on the ground that the state unconstitutionally excluded lessees of real property within the District from voting in the elections.

ARGUMENT

A. *Exclusion*

Much of this Court's jurisprudence in the area of voting rights has been developed in cases scrutinizing state schemes, such as the ones here, which denied the franchise outright to certain citizens or groups. Such a judicial response is not surprising, for the right to vote, since it opens the door to the political process, has been the focus of much discrimination. Certain groups or classes were so historically the victims of that discrimination, such as blacks and women, that separate constitutional protection of their franchise was established (in the Fifteenth and Nineteenth Amendments). Yet even in the controversies concerning the franchise of such historically mistreated groups the Equal Protection Clause has loomed large and it is quite clear from our present perspective that much of what was guaranteed under those later Amendments could have been, and frequently was, accomplished under the Equal Protection Clause alone.

Thus, for example, the right of blacks to vote in party primaries is firmly established as a part of the guarantee of the Fifteenth Amendment. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944). But the same right is also a part of the Equal Protection Clause. *Nixon* v. *Condon*, 286 U.S. 73 (1932) (opinion by Cardozo, J.).

And while the right of blacks not to be disenfranchised by racial gerrymandering is easily found in the Fifteenth Amendment, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the same result was independently available under the

Equal Protection Clause—as pointed out by Mr. Justice Whittaker, concurring in *Gomillion*. In fact, the theory that the Equal Protection Clause prevents a registrar of voters from refusing to register blacks because of their race was accepted as early as 1927 by Mr. Justice Holmes, writing for a unanimous Court in *Nixon* v. *Herndon*, 273 U.S. 536 (1927).

These cases are the core of the constitutional guarantee of the voting rights of traditionally disfavored groups. They all are, or could have been, equal protection cases. They are straightforward answers to the most obvious types of discrimination.

But just as there are many motives for discriminating at the polls beyond the fear or mistrust based on race or sex or religion, there are many disfavored groups, many neither historically disfavored nor permanently fixed, but carved out to suit some discriminatory goal. For these, too, the Equal Protection Clause has provided shelter. An obvious example is *Harper* v. *Virginia State Board of Education*, 383 U.S. 663 (1966), in which the Court struck down Virginia's poll tax as a violation of Equal Protection since it discriminated against the poor. This class is not one tied to race, sex, or religion, and the historical mistrusts they evoke. Its members are mobile; its boundaries are vague; it is a group that one may enter, or leave. The concept of Equal Protection was flexible enough to protect it.

Carrington v. *Rash*, 380 U.S. 89 (1965), illustrates the same flexibility. There the Court invalidated a Texas constitutional prohibition of voting by servicemen who entered Texas while in service, even though they might be bona fide residents. Here the protected group was even more

temporary than the "poor," and certainly neither historically suspect nor traditionally disfavored. But united by its condition—military status—it was entitled to equal protection.

Kramer v. *Union Free School District No. 15, supra,* continued the process of guaranteeing equal protection of the laws to groups denied the franchise in particular elections for less than compelling state interests or by methods unnecessary to what may or may not have been compelling interests. There the Court invalidated a New York statute which limited participation in school district elections to those who (1) owned or leased taxable real property in the district, (2) were married to one who so owned or leased, or (3) were the parents of or had custody of a child enrolled in a local district school. Pointing out that the petitioner, a bachelor who lived with his parents, was interested in and affected by the outcome of the elections but ineligible to vote in them, as were senior citizens, boarders, clergy, and others, the Court held that this latter group was denied equal protection by the statutory limitation.

More recently this Court decided two cases which, along with *Kramer*, are of obvious relevance here. Both involved local elections to pass upon revenue bonds, *Cipriano* v. *Houma*, 395 U.S. 701 (1969) and general obligation bonds, *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), from which otherwise qualified voters who were not property-taxpayers were excluded. In both, this Court held the excluded groups were entitled to equal protection, and rejected various asserted state interests proffered to justify denying a political voice to those groups. In reaching that result in *Kolodziejski*, the Court held that:

> The differences between the interest of property owners and the interests of non-property owners are not sufficiently substantial to justify excluding the latter from the franchise. 399 U.S. at 209.

The Court went on to reject as justifications several purportedly compelling interests which are virtually indistinguishable from those advanced here.

Cipriano and *Kolodziejski* are extremely important to the cases here because they are the first voting rights cases to apply an equal protection analysis to elections where citizens, instead of voting for public officials who will in turn determine public policy, are themselves passing directly upon questions of public policy. Thus, to the extent that the appellees here claim that persons who are excluded from voting or whose vote is depreciated are disabled in that manner because they have a diminished interest in the issues passed upon by the water districts, *Cipriano* and *Kolodziejski* undermine the districts' contentions. Moreover, in those two cases, this Court applied the rigorous equal protection standard invoked to test infringements of the right to vote, and demanded a showing that the exclusion of some voters was necessary to advance compelling state interests.

These cases demonstrate the willingness of this Court to expand the categories of protected groups far beyond those stable classes traditionally the victims of discrimination, into an infinite number of situations involving the selective distribution of the franchise. They also demonstrate that this Court will not tolerate schemes designed to deny the vote completely to certain groups and individuals.

B. *Dilution*

Relevant to this case is another doctrinal development, of more recent origin: the apportionment or one man-one vote cases. Beginning with the historic decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has evinced an additional constitutional concern not merely with denial of a political voice to certain classes or citizens, but with *dilution* of that political voice. This second line of decisions involves state geographical districting systems which dilute the effectiveness of the franchise either directly or through the allocation of legislative representation.

Beginning in *Gray* v. *Sanders*, 372 U.S. 368 (1963), continuing in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) and culminating in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) this Court developed the doctrine that each qualified voter is entitled to an equal voice in the political process. *Reynolds* was a doctrinal watershed where, building upon previous rulings which invalidated attempts to deny the franchise, this Court announced the rule that equal protection safeguarded against not only denial of the vote, but against dilution as well:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted. . . . The right to vote can neither be denied outright . . . nor destroyed by alteration of ballots . . . nor diluted by ballot-box stuffing . . . Racially based gerrymander-

ing . . . and the conducting of white primaries, . . . both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.* *Reynolds* v. *Sims, supra* at 554-55 (citations and footnotes omitted) (emphasis added).

The Court went on to spell out its concern with apportionment schemes which diluted the weight of a citizen's vote, depending on geographic residency:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . Weighting the votes of citizens differently, *by any method or means,* merely because of where they happen to reside, hardly seems justifiable.
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>
> Full and effective participation by all citizens in state government requires, therefore, that each citizen have *an equally effective voice* in the election of members

> of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. 377 U.S. at 563-565 (emphasis added).

In numerous cases since then, the Court has utilized this equal voice doctrine, or one man one vote, to require almost absolute equality in population of legislative districts in order to insure that there will be no dilution of the electoral influence of each voter. See, *e.g.*, *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). More relevantly, the dilution doctrine has also been applied to elections for local governing bodies, legislative or governmental. See, *e.g.*, *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). In *Hadley*, the Court summarized its prior rulings as establishing the principle that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted" and that all voters had the right "to have their votes given the same weight as that of other voters." 397 U.S. at 52. The Court continued:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. 397 U.S. at 54 (footnote omitted).

See also, *Kramer* v. *Union Free School District No. 15*, *supra* ("Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close

scrutiny from this Court. . . . No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age." 395 U.S. at 626 [emphasis in original]).

Nor did this Court's decision in *Gordon* v. *Lance*, 403 U.S. 1 (1971) undermine these premises or depart from these traditions.

There, this Court upheld constitutional and statutory provisions which required that referenda to incur state financial indebtedness obtain the approval of 60 per cent of those voting. In so ruling, this Court reaffirmed the principle that "denial or dilution of voting power" could not be premised on "group characteristics—geographical location and property ownership—which bore no valid relation to the interest of those groups in the subject matter of the election . . . " 403 U.S. at 4. Indeed, the Court viewed *Cipriano* as "a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition such as . . . wealth . . . ", *id.* at 5, and went on to note:

> While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. 403 U.S. at 4, n. 1.

Thus, *Gordon* v. *Lance* restates this Court's condemnation of schemes which utilize financial requirements to deny or dilute voting power.*

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* The decision in *Gordon* v. *Lance* rests, in part, on the fact that extramajoritarian requirements are embodied in the federal and various state Constitutions. Similarly, the decision in *James* v. *Valtierra*, 402 U.S. 137 (1971) was partly premised on the democratic value of utilizing referenda.

And again last Term, this Court rejected the twin constitutional evils—total exclusion of a class of citizens from the election process and conditioning access to the ballot on wealth—which are embodied in the Wyoming and California statutes.

In *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L. Ed.2d 274 (1972) this Court struck down a requirement of durational residency as a precondition to voting. The Court summed up the applicable principles in the following way:

> Durational residency requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "a fundamental political right, . . . preservative of all rights." There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes which selectively distribute the franchise. In decision after decision this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote" is not absolute; the states have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 31 L. Ed.2d at 284 (citations omitted).

The Court then considered the suggested justifications for a durational residency requirement and held that none of

them was necessary to the accomplishment of compelling state interests.

And in *Bullock* v. *Carter*, 405 U.S. 134, 31 L. Ed.2d 92 (1972) the Court rejected the imposition of direct financial obstacles on access to the ballot. In invalidating excessive filing fee requirements in primary elections, the Court noted that a system which based voting power on wealth, even indirectly, "falls with unequal weight on voters . . . according to their economic status." 31 L. Ed.2d at 100. By contrast, the system here directly and explicitly discriminates against voters "according to their economic status."

C. *The Application of the Two Principles*

Dunn v. *Blumstein* and *Bullock* v. *Carter* reaffirm the two principles from which this Court has not wavered—that absent the most persuasive reasons the state may not deny the vote to any class of citizens or dilute the voting power of citizens on the basis of their financial status.

As the Court's review of its precedents makes clear, it has been preoccupied with the equal protection ramification of both denial and dilution of the right to vote. It has refused to tolerate the exclusion of voters from elections for public officials or from elections where voters are asked to pass directly upon public questions. And the Court has also made it clear that it will be similarly vigilant against schemes which dilute the vote of particular citizens or groups. From these two separate doctrinal strands, a unifying principle emerges: the definition of those who will be entitled to participate in a particular election is subject to rigorous scrutiny to determine whether anyone has been

improperly excluded, and once the electorate for any given election is defined in a constitutional manner, each voter is entitled to an equal voice in the outcome.

The statutes here run afoul of these principles. They presume that only landowners have a cognizable interest in the water resources policies of the community and that that interest is directly proportional to the amount of their holdings. Such reasoning not only reflects a kind of economic royalism abhorrent to our constitutional principles, but it is simply not true. As the motion preceding this brief makes clear, the water resources policies in a given area can be literally vital matters, i.e., matters of life and death, to all residents of the region. When the decision-making process of a local governmental unit, even one with a specialized function, can have such an impact on people, they must not be excluded from the election of its officials. See *Kramer* v. *Union Free School District, supra.*

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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